IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 26.

26

UNITED STATES OF AMERICA,
Petitioner,

v.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO.,
Respondent.

BRIEF OF WESTINGHOUSE ELECTRIC & MANUFACTURING CO. (now Westinghouse Electric Corporation).

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CITATIONS

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BRIEF OF THE RESPONDENT.

Opinions Below.

The opinion of the District Court (R. 26-28) is reported *sub nom. United States v. Two Parcels of Land*, 71 F. Supp. 1001. The opinions of the Court of Appeals (R. 31-41) are reported in 170 F. 2d 752.

Question Presented.

Whether, when the United States condemns the use of leased property for a term of less than the remainder of the lessee's term, with options in the taking to extend from year to year and these options are exercised, (1) after the

taking, (2) after the removal of the tenant, and (3) after the tenant has asserted a claim for compensation, and such exercised options eventually take the entire remainder of the lease, the lessee is entitled to recover the market value of its right to occupy?

Statement of Facts.

The case was presented to the District Court upon a stipulation of agreed facts (R. 20-22).

Briefly this stipulation set forth: that the United States had filed a petition to condemn a property occupied by Westinghouse as a long term tenant; that the condemnation was for the period Feb. 18, 1943-June 30, 1943 "renewable for additional yearly periods . . . . at the election of the Secretary of War"; that immediate possession was granted; that the lease of Westinghouse did not expire until October 30, 1944; that the United States subsequently on May 1, 1943 renewed its taking to June 30, 1944, and on May 25, 1944 renewed to June 30, 1945; that the cost to Westinghouse of removing its property was $25,600; that "as of February 18, 1942 the market value of so much of the building in question as was occupied by the Westinghouse Electric Corporation as a lessee, on a sub-lease which would be given by its as a long term tenant to a temporary occupier over and above the rent reserved under its lease was the sum of Twenty Five Thousand Six Hundred and 00/100 Dollars ($25,600.00), being its removal cost to make the property available to the temporary occupier; and that said sum was the value of the occupancy of Westinghouse Electric Corporation under its said lease." The preceding quotation from the stipulation (R. 21) was what it was agreed the testimony of Westinghouse would be at formal trial, the admissibility of which was not conceded by the Government in the stipulation.

Upon the stipulation the District Court entered a finding in favor of Westinghouse in the sum of Twenty Five Thousand Six Hundred Dollars ($25,600.00) (R. 25-26) and upon appeal by the Government this judgment was affirmed (R. 31-41).

Westinghouse contends that the judgment was properly entered and should be affirmed.

Argument.

The Finding Below Was Proper.

A. The decision was required by the GENERAL MOTORS case.

In all eminent domain cases the courts are faced with a determination of the meaning of "just compensation" as used in the Fifth Amendment. The concept of market value has evolved as being the test. Therefore when the fee is taken the sovereign must pay the market value of the property taken. The market value of a piece of real estate is not affected by the cost of removal therefrom and this is therefore not an element of damage in such cases, *Bothwell v. United States*, 254 U. S. 231. The only exception the writer knows of to this standard of market value in cases where the fee is taken is where the taking is of public franchises such as streets; there the standard of compensation is not market value but the cost of replacement or of supplying otherwise adequate facilities, *U. S. v. City of New York*, 168 Fed. 2nd 387.

In special types of cases the market value of the property taken includes elements in addition to the market value of the fee in the real estate. Such are the public utility cases where the taking includes a private franchise which the taker is to use, *Omaha v. Omaha Water Co.*, 218

U. S. 189. There, obviously, the franchise is itself property for which just compensation must be paid, and that compensation again is market value.

Where the property taken has been a leasehold interest the market value of the leasehold has been the just compensation found to be due the tenant.

Not until the case of *U. S. v. General Motors Corp.*, 323 U. S. 373, was the court faced with the problem of determining what was just compensation for the taking of a portion of a leasehold interest. There again in arriving at its decision the Court adhered strictly to the standard of market value. In the *General Motors* case in determining the just compensation to be paid on condemnation of a right of temporary occupancy of leased space, where the original taking did not exhaust the lease the court said "the value of such an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what would be the market rental value of such a building on a lease by a long-term tenant to the temporary occupier", 323 U. S. 373, 382. The court then went on to consider some of the elements which would affect the market price agreed on between the tenant and such a sub-lessee, and held that the reasonable cost of moving out of the premises might be proved as an aid in the determination of such market value.

So in the present case (R. 21) it was agreed by stipulation that witnesses . . . would testify . . . that Westinghouse . . . expended $25,600.00 . . . in moving . . . that said expense was a necessary expenditure . . . was a fair and reasonable sum . . . that on February 18, 1942 the market rental value of . . . the building . . . occupied by Westinghouse . . . as a lessee, on a sublease which would be given by it as long term tenant to a tem-

porary occupier over and above the rent reserved under its lease was . . . $25,600.00, . . . and that said sum was the value of the occupancy of Westinghouse . . . under its said lease.

The evidence, then, here is just what the *General Motors* case says is admissible. Let us look to the taking. The taking was made on February 18, 1943 for a term ending June 30, 1943 with options in the Government to renew for additional yearly periods; the term of Westinghouse did not expire until October 30, 1944 (R. 20). In the *General Motors* case the original taking was for one year and the Government later amended its petition for condemnation so that the taking was renewable for additional yearly periods at the election of the Secretary of War. The factual situation at the time of the taking is then, here, identical with the *General Motors* case.

B. The PETTY MOTOR case does not alter the GENERAL MOTORS decision.

The United States has argued that because the subsequent exercise of the options in its taking eventually exhausted the term of Westinghouse's lease the *General Motors* case is inapplicable and *United States v. Petty Motor Co.*, 327 U. S. 372 is controlling. The right to just compensation in the instant case as in every such case arose on the date of the taking. Just compensation is market value on the date of taking not a value to be found by events transpiring at some future date the occurrence of which cannot be foretold on the date of taking. As of the date of this taking, measured by the then known facts, Westinghouse was under an obligation to the landlord for that portion of the lease not taken; and, as pointed out in the *General Motors* case, because of that continuing obli-

gation the value of the lessee's rights which were taken was affected by the cost of the temporary removal. In the *Petty Motor* case the original taking exhausted the entire terms of all the tenants, the tenants were under no further obligation to the landlord, even though the United States did have the right to surrender the premises during the original term.

Westinghouse contends that the measure of damages should be and is determined by the state of facts existing at the time of the taking; that when the original term taken by the Government carves out only a portion of the lessee's leasehold then the rule of the *General Motors* case applies. The lessee must seek a new location mindful of the fact that he is obligated to return to the original premises when the Government's term expires. In making his future plans such a lessee cannot contemplate that the Government will exercise its options of renewal so as to free him from his continuing obligation to the landlord. To hold that the measure of damages is determined by the state of facts existing at time of trial or at the time the Government quits the premises is to disregard this crucial element which was the basis of the *General Motors* decision. Such a holding could mean that of two tenants in a single building holding identical leases one would be permitted to prove his moving costs as an element of the value of his occupancy because his case happened to be tried before the option exhausting the term was exercised; the other tenant would be barred from such proof because his case happened to be tried after such option was exercised. It should be observed that in the *General Motors* case the Government's lease was "renewable for additional yearly periods thereafter . . . at the election of the Secretary of War"; so that these such renewals might have eventually

exhausted the lease but the Court did not consider this fact as having any bearing upon the measure of damages.

The *General Motors* and the *Petty Motor* cases make a clear distinction: if at the time of the taking the entire term is taken, evidence of removal costs is inadmissible (*Petty Motor* case); if the taking is of only a portion of the leasehold then such evidence is admissible (*General Motors* case). The effect upon the tenant is the basis of this distinction; in the first case he is under no continuing obligation to the landlord, in the second case he is; in the first case his damage is simply the difference in market value of his space as measured by the difference between the market value at the time of the taking and the rent reserved in his lease; in the second case there is added to this damage the additional element that he must face immediate removal costs and still remain obligated to the landlord for the balance of the term. In such case he must contemplate moving back after the temporary occupier vacates and must therefore expect to face moving costs a second time. A lessee in the second case would not voluntarily sublet for the same price as he would in the first case and therefore the measure of just compensation is not the same as the *General Motors* and *Petty Motor* cases have held.

The position of the United States, it is submitted, confuses "condemnation" and "occupancy". It is the condemnation proceedings that fix the right to damages. In the *General Motors* case the condemnation was for less than the leasehold period; however the Government might have exercised its options so as to exhaust the lease, yet the Court did not hold that the lessee must await the eventual termination of the United States' occupancy before being awarded damages for the taking. The United States in the

instant case took only the period from Feb. 18, 1943 to June 30, 1943; that taking fixed the lessee's right to just compensation just as it did in the *General Motors* case regardless of what occupancy the Government later enjoyed through exercising options. On Feb. 18, 1943 Westinghouse had no certainty that it would not have to resume its lease on June 30, 1943. Would the argument of the United States be the same if instead of having two successive options to exercise to exhaust Westinghouse's lease it had made two new takings for the additional terms? Yet that is all that was accomplished by the exercise of the options. It is submitted that the only proof required of the claimant on the point of its being compelled to resume its obligations under the lease was the proof which was stipulated: that the lease did not expire until Oct. 30, 1944 and the taking was for a period ending June 30, 1943. The value of the lessee's occupancy at the date of the taking is the question in issue, to be determined as the facts then existed.

There is a very substantial practical difference between whether the duration of the Government's term depends upon an option to cancel as in the *Petty* case or upon an option to renew as in the instant case. That practical difference is that the *taking* in the *Petty* situation exhausts all of the tenant's term and frees him forthwith from any obligation under his lease; in the *General Motors* case the *taking* did not exhaust the term, nor did it in the instant case. That fact is the precise basis for the special rule of damages propounded by the *General Motors* case. In both the *Petty* case and the *General Motors* case the Court considered the situation as it existed at the time of the taking, and did not inquire *ex* to whether the options to cancel might be exercised in the *Petty* case or whether sufficient options to renew might be exercised in the *General Motors* case to exhaust the term. In fact, as evidenced by the foot-

note in the *General Motors* decision (at p. 376), the Court considered an option of renewal identical with the one in the instant case, noted that the Court below had retained jurisdiction for the ascertainment of further compensation and said: "We do not understand that these facts alter the question before us. The case now presented involves only the original taking for one year. If on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be awarded". This was said by this Court on January 8, 1945; the *General Motors* lease had then but three years to run; it was on that date very probable that the Government might require this space "at the election of the Secretary of War"; yet this Court properly did not consider such facts and decided that the method of taking adopted by the Government required a new rule of damages in order that the tenant's right to just compensation might be preserved.

C. Certain Matters of Proof.

The United States in its Brief (Br. of U. S. p. 12) has made certain statements as to proof which may require answer.

The United States has stated that in the instant case the appellee does not claim the right to be compensated for the rent reserved or that the premises have a rental value in excess of the rent reserved. If by this the Government means that Westinghouse does not claim that the market value of the empty warehouse space was in excess of the price set in these proceedings then the statement is true; however, as pointed out in the quotation in the Statement of Facts from the stipulation of agreed facts, Westinghouse does not concede that such figure represents the market value of its occupancy at the time of the taking. The market

value of Westinghouse's occupancy was the rent reserved plus the sum of $25,600.00, being its removal cost to make the property available to the temporary occupier.

The United States has also stated that it was incumbent upon Westinghouse to prove it was obligated to return to the leased premises. The lease in question is attached to the stipulation (R. 22-25) and is specifically made a part of it (R. 20). It speaks for itself and is proof that the lessee was bound until October 31, 1944 and would have been compelled to resume its obligations under the lease if the Government had not exercised its options for the two additional yearly periods. In certain instances (R. 33) the lease gave the *lessor* the right to terminate the lease. One of these instances was if "*the estate* hereby created shall be taken . . . by other process of law." However, the estate of the lessee was not taken by the original condemnation proceedings, which is the time when the respondent asserts it suffered damage—only a portion of the estate was then taken. Furthermore there is no showing by the Government (which had the burden to rebut the *prima facie* case of the respondent's obligation to resume its lease obligations made out by the introduction of the lease in the stipulation) that the lessor ever exercised or attempted to exercise any right to terminate the lease. And in fact the lessor never did.

D. The authorities cited by the United States do not warrant the consideration of events subsequent to the taking.

The United States takes the position (Br. of U. S. p. 21) that the admissibility of evidence as to moving costs "necessarily depends upon events that in the nature of things could only occur later." Westinghouse has shown above that no such consideration was resorted to in the *General*

Motors case which factually was identical with this. The United States attempts to give judicial sanction to its assumption by citation of authorities.

The decision in *Marion & Rye Valley Railway Co. v. U. S.*, 270 U. S. 280 (Br. of U. S. p. 22) goes no further than to declare that the Railway had the burden of proving damage and had not sustained the burden when it failed to show any interference with its management, control or operation. There was in fact no real taking in this case, nothing for which just compensation was due. It is not authority for the assumption made by the United States.

Sinclair Refining Company v. Jenkins Co., 289 U. S. 689 (Br. of U. S. p. 23) is not an eminent domain case. In actions of tort for personal injury and other types of cases Westinghouse admits that evidence of damage sustained subsequent to and flowing from the tortious act are admissible; but such has never been the rule in eminent domain cases. In the *Sinclair* case where the value of a patent was in issue the market value test failed because it might relieve the tort feasor of responsibility for its wrong; the court therefore admitted evidence of the use to which the patent was put as "a legitimate aid to the appraisal of the value of the patent at the time of the breach". The court merely allows the uncertain prophesy of the appraisal to be corrected by evidence of experience.

United States v. Certain Parcels of Land in Baltimore, 55 F. Supp. 257 (Br. of the U. S. p. 27) goes no further than to hold that the court will retain jurisdiction for the purpose of determining future damage that may occur to the taken premises which, of course, was not ascertainable at the time of the taking. This the court does to *protect the landowner*, after he has received just compensation for

the property temporarily taken, for any damage which the taker may do to such property before returning it to the landowner. To the same effect is *In re Condemnation of Lands for Military Camp*, 250 Fed. 314 (Br. of U. S. p. 26).

11,000 Acres of Land v. U. S., 152 Fed. 2nd 566 (Br. of U. S. p. 23) is authority not for the assumption of the United States but rather for the two contentions of Westinghouse that (a) market value is the test of just compensation, and (b) the value at the time of the taking is what is considered. In arriving at the value of a gas and oil lease the court held that the damage for *each year's taking* was to be arrived at by finding the difference between the market value of the lease prior to each taking and the market value following each year of the taking.

The case of *U. S. v. Brooklyn Union Gas Co.*, 168 Fed. 2nd 391 (Br. of U. S. p. 22) presents a very different problem from the case in issue. In that case streets were taken in fee including all rights and easements, as a result this taking included the condemnation of gas and electric franchises. There is no readily ascertainable market value for public utility franchises and for this reason their valuation in eminent domain proceedings has always presented problems different from those involving the taking of other forms of property, see Orgel, *Valuation under Eminent Domain*, 1936, Sect. 26. This case recognizes such differences, the court saying (at p. 395) "a franchise must be valued * * * upon what as a matter of business judgment would be considered its worth, if not on sale, at least as a producer of earnings", and (at p. 396) "the standard method of valuing a franchise is on the basis of its earnings, past as well as prospective * * * a valuation of expected profits * * * tends to be a capitalization merely of hopes", and (at p. 397) "the value at the time of taking

must be developed, in default of a sale price, largely from a consideration of past earnings and such showing of prospective earning power as can be made. Hence deductions on conclusions as to future productivity not only must be made, but are an important element in a case of this kind". The court then goes on to hold that actual happenings following the taking are admissible "to support or check the assumed prospects". In other words the court recognizes that it is attempting to evaluate an intangible, that even the most honest expert opinion in such a case is merely an informed guess, and that therefore facts subsequent to the taking should be admitted to justify or correct this guess. But it is submitted that only in cases that involve the taking of utility franchises has this novel rule of evidence found support. In this respect it is interesting to note that in *Kimball Laundry Company v. United States*, 338 U. S. 1 where the court very recently was seeking to define methods of determining the valuation of another type of intangible —the value of trade routes, or good-will value—the court never once suggests the introduction of evidence of what actually happened to the trade route in question, although at the time of the hearing the government's user had ceased. The court suggests only methods of computation which experts, cognizant of and using the facts existing and known at the time of the taking, might employ to fix a market value for the trade routes; in other words it fits the case into the well-known market value formula, and makes no suggestion of extending the method used in utility franchise cases as indicated by the *Brooklyn Union Gas* case, even though the *Kimball* case involved the valuation of an intangible much more analogous to a franchise than to a leasehold or other form of tangible property.

Conclusion.

Westinghouse, therefore, contends that neither by resort to precedent nor to its own logic has the United States differentiated this case from the *General Motors* case. The decision in that case was a salutary one and should be preserved. This case involves not the extension of the *General Motors* decision, but its very preservation. As of the date of the taking the facts in the instant case and in the *General Motors* case were identical: in each there had been a taking of a portion of a long term lease with rights to renew which might exhaust the lease. At the date of trial the facts vary; in the *General Motors* case sufficient options to exhaust the term of the lease had not yet been exercised, in the present case they had. In asking this court to upset the decision below the United States is in effect requesting the approval of a method by which it may circumvent the *General Motors* decision by the expedient of delaying trial of condemnation suits and payments of just compensation until such time as it chooses to decide that it no longer wants property it has taken on a year to year basis "at the election of" some individual within the Government. Such a result would be the end of the Fifth Amendment so far as it guarantees just compensation for private property taken by the United States.

Fair, just and reasonable compensation has always been the measure of damages in condemnation cases, and always that value has been the value as of the time of taking. The *General Motors* decision detecting a method by which the United States might avoid such payment in a case identical with the instant case checked the potential abuse of the power of eminent domain. The United States has here advanced no argument for overruling or circumventing that decision.

It is, therefore, respectfully submitted that the judgment below was correct and should be affirmed.

WESTINGHOUSE ELECTRIC CORPORATION,
(formerly WESTINGHOUSE ELECTRIC & MANUFACTURING CO.)

By MILTON J. DONOVAN,
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